# FILE COPY.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 60

Office Supreme Court U
FILED
DEC 11 1905
JAMES H. McKENNEY,
C

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

*vs.*

CITY OF COLUMBUS *et al.*

## Opposition of Appellant to Motion to Advance Case Under Rule 32.

JOSEPH PACKARD,
JOHN I. HALL,
OLIN J. WIMBERLY,
L. F. GARRARD,
COUNSEL FOR APPELLANT.

ATLANTA, GA.
The Franklin Printing and Publishing Company
Geo. W. Harrison, Manager
1905

# Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 303.

---

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Appellant*,

vs.

CITY OF COLUMBUS *et al.*

---

## OPPOSITION OF APPELLANT TO MOTION TO ADVANCE CASE UNDER RULE 32.

---

The Mercantile Trust and Deposit Company of Baltimore, appellant in the above entitled cause, being advised that the City of Columbus will move that said cause be advanced under Rule 32, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals, comes now and prays leave to resist and oppose said motion, and respectfully submits this its specification of grounds of opposition to said motion, as follows, towit:

I.

That the case is not one falling under Rule 32, according to the spirit and true intent and meaning of said rule. While the appeal is taken to this Court from the United States Circuit Court upon a question of jurisdiction certified to this Court

agreeably to the first clause of Section 5 of the act of March 3, 1891, Chapter 517, familiarly known as the Evarts Act, yet as the jurisdiction of the Court below was invoked upon the ground that the case involved the construction and application of the Constitution of the United States, and on the ground that the law of the State of Georgia mentioned and set forth in the appellant's bill of complaint was, as appellant claimed, in contravention of the Constitution of the United States, and as this is the question of jurisdiction certified to this Court from the Court below for decision, the effect of the decision by this Court of said question of jurisdiction will necessarily involve a decision of constitutional questions which constitute grounds of, and give the right to, a direct appeal to this Court from said Circuit Court under the fourth and sixth clauses of Section 5 of said Act. And it is appellant's insistence that it is not within the spirit and purpose of Rule 32, that a case involving grave constitutional questions and uniting three of the six grounds on which a direct appeal lies to this Court from the Circuit Court, should be tried and determined upon motion and summarily without the privilege and benefit of oral argument on the part of appellant.

II.

That in a case of this character, where jurisdiction of the Circuit Court is invoked upon the ground thatt he suit arises under the Constitution of the United States, and the constitutional questions upon which jurisdiction turns are such as entitle a party to a direct appeal to this Court under the fourth and sixth clauses of Section 5 of Evarts Act, and at a late stage of the case and after the accumulation of a large record the bill is dismissed for want of jurisdiction based upon a determination of the constitutional questions adversely to the contentions of plaintiff, and an appeal by plaintiff under the first clause of said Section 5 presents the constitutional questions clearly and fully,

and a decision by this Court upon the question of jurisdiction will of necessity be a direct and complete decision of the constitutional questions upon which jurisdiction hinges, it is not according to the spirit and meaning of Rule 32, that by adopting the less cumbersome form of appeal furnished in cases where jurisdiction is in issue, a party should be held to have disentitled itself to the benefit of oral argument and a hearing according to the usual rules. The case which is certified to this Court from the Court below for decision is a case in which a law of the State of Georgia is claimed to be in contravention of the Constitution of the United States, and involves the construction and application of the Constitution, and it is upon these grounds the claim of jurisdiction is based. A decision of the case on this appeal adversely to appellant is necessarily a final determination of appellant's claim that the aforementioned law of the State of Georgia is in contravention of the Constitution of the United States, and involves a construction and application of the Constitution adversely to appellant's contention. Appellant could not under any other form of appeal have raised these questions more clearly, fully or completely. Appellant insists that it is not the purpose of Rule 32 to render compulsory a resort to a different form of appeal presenting in reality the same question for decision, but at a far greater burden of expense to litigants, and of labor to counsel and the Court.

## III.

That by reason of the nature of the case and the gravity and importance of the questions involved, appellant prays that the Court in the exercise of its discretion do not hear and determine the case under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals, as permitted in cases falling within Rule 32, but hear the case regularly, and

with the privilege of oral argument under the usual rules. And appellant shows for cause :

That as appears from the facts certified and sent up to this Court from the Court below this appellant as plaintiff on July 30th, 1903, exhibited its bill in the Fifth Circuit Court of the United States for the Northern District of Georgia (Western Division) against the City of Columbus, a municipal corporation in Georgia, its mayor and aldermen, and the Columbus Waterworks Company. The bill averred that plaintiff was by the Water Company on January 1, 1891, constituted trustee for holders of $500,000 of its bonds ($392,000 of which were issued and sold), to secure payment of which it conveyed to plaintiff as trustee all the property then owned by it, or thereafter to be acquired, including the contract between the City of Columbus and the Water Company, being in the form of an ordinance, set forth in the bill, of which a copy was annexed. The bonds were issued to provide funds to construct and complete a system of waterworks as called for by the contract between the City and the Water Company, and enable the Water Company to comply with the contract. The works were accepted by the City, and the city was furnished with fire protection and a water supply for its inhabitants for a number of years under the contract. The City knew that the money was to be realized from the issue and sale of bonds, and to make such bonds more attractive agreed by a provision of the contract to accept the due coupons for taxes. The City as a part of the contract obligated itself not to erect waterworks of its own during the life of the contract, but granted to the Water Company the exclusive franchise of maintaining and operating waterworks during the thirty years the contract covered, unless the works were sooner purchased by the City, as the contract gave it the right to do. The City by the contract obligated itself during the time aforesaid to take and pay for the water furnished for fire protection at the price stipulated and to levy a tax for the purpose, and the contract contained a number of provisions designated to secure purity and wholesomeness of water, the stipulated pressure,

needful enlargements and extensions, and other features designed for the due protection of the city and its inhabitants and the Water Company. The City Charter gave the City the power to provide its inhabitants with water for domestic use, as well as to provide the city with water for fire protection. The contract was valid and binding, and the Water Company complied faithfully with its obligations thereunder. The contract provided tests. The bonds were purchased upon the faith of the contract and derived their value therefrom. After the contract had been in force and the stipulated rentals paid for a number of years, the City of Columbus, in September, 1902, passed an ordinance to provide for the construction of a system of waterworks of its own for the purpose of supplying the City and its inhabitants with water, and the issue of bonds to provide the necessary funds. Pursuant to the provisions of such ordinance, an election was held whereby the proposition submitted by the ordinance was carried by a sufficient majority of the legal voters. The City was proceeding to sell the bonds and build the waterworks for the purpose of operating the same to supply itself with water for fire protection, and to furnish water to its inhabitants for domestic use. It was averred by the bill that the ordinance aforesaid was a law impairing the obligation of said contract. It was further shown by the bill that the General Assembly of the State of Georgia passed an Act on the 3d day of December, 1902, granting the City of Columbus permission and authority to erect its own waterworks, and supply its inhabitants with water, and furnish water for fire protection, contrary to and in impairment of the obligation of the aforesaid contract. It was averred that this was a law impairing the obligation of the contract.

It appeared from the bill that by reason of said ordinance and said statute, and the action had and threatened thereunder, the value of said Water Company's property, constituting the bondholders' security, would be greatly diminished and practically destroyed; that the value of the property was derived from the contract and the fact of the company's having no competition; that the company could not successfully compete with the city

itself in supplying water to the city and its inhabitants; that the City's action had destroyed the Company's credit, and its ability to make necessary additions and repairs and meet the interest on its bonds; that the Water Company finding itself, by reason of the City's action, unable to pay interest on its bonds and successfully carry on its business, and notifying the plaintiff, trustees for bondholders, plaintiff instituted a bill for foreclosure in the aforesaid Circuit Court of the United States, and a receiver was appointed of said Water Company; and at the instance of bondholders and with money furnished by them large extensions and improvements had been made with a view to allay any possible dissatisfaction, and preserve the benefits of the contract and this valuable property from destruction by the city's threatened action, and thus save their investment from destruction. Irreparable injury was shown. Injunction was prayed against the sale of the bonds, the erection by the city of its own system of waterworks, the supply of water for fire protection and domestic use, and the other threatened acts in carrying into effect the aforesaid law (ordinance and statute) impairing the obligation of said contract. Jurisdiction was invoked under the impairment of contract clause of the Constitution, and it was claimed by the bill that the aforesaid ordinance and statute were laws of the State in contravention of the Constitution of the United States, and the averments of the bill made a case, as appellant insists, which involved the construction and application of the Constitution of the United States.

After the hearing upon the application for injunction and the grant of an injunction, a demurrer to the bill was upon argument overruled December 8th, 1903, on each and all the grounds, including a jurisdictional ground similar to the ground of the motion to dismiss subsequently made; and an order overruling the same was on said date duly entered.

The defendant, the City of Columbus, answered, and the cause came on to be heard in due course, after answer and replication, and a general order of reference duly made. Evidence was taken before the Master, and the Master filed his report upon the various questions of law and fact involved. To this

report exceptions were filed by both parties, and argument was had thereon before the Court. After the argument, but before the time for filing briefs had expired, the City of Columbus filed a motion to dismiss the bill for want of jurisdiction, on the ground that there was no such diversity of citizenship as was requisite to sustain jurisdiction, and that there was no federal question involved on which the jurisdiction of the court could be sustained "for that the action of the city in proceeding to issue bonds for construction of its own system of waterworks constituted at most a mere breach of the contract not equivalent to legislation affecting or impairing the obligation of the contract between the City of Columbus and the Columbus Waterworks Company, as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States."

The plaintiff having submitted its response, which is in the record certified, and which was considered by the Court, the said motion to dismiss for want of jurisdiction was on April 29, 1905, sustained.

As appears from the facts certified to this Court, the appellant, as trustee for bondholders, and with their consent, subsequently to the passage of the aforesaid ordinance and statute averred to be in impairment of the obligation of said contract, and by reason of the conditions brought about thereby, procured to be expended by the receiver of the Court appointed under the aforesaid foreclosure proceedings, more than $60,000, about one-half of which was raised upon receiver's certificates to which the bonds are postponed, and the remainder drawn from income to which the bondholders would have been otherwise entitled. Said expenditures were authorized while bondholders, through their trustee, were endeavoring to protect the aforesaid contract against impairment, and at a time when the decisions of said Court, based it was believed upon the decisions of this Court, justified them in believing that the rights which they claimed under the Constitution of the United States authorized the expenditure.

By amendment to the bill filed before the hearing of the

application for injunction, bondholders had offered through their trustee to furnish whatever amount of money the Court might deem needful to enlarge and extend the waterworks system to meet future needs of the city as well as present needs.

The constitutional questions made by the bill, and upon which jurisdiction is invoked, are grave and weighty, urged in good faith, and, we believe, this Court will recognize to be not without merit.

Upon their decision rests the preservation or destruction of the $392,000 invested in these bonds, upon the faith of the constitution's protection of contract obligations against impairment by law.

Of the six classes of cases which are deemed sufficiently important to be the subject of direct appeal to this Court from the Circuit Courts, one relates to final decisions and decrees in prize cases, one to capital crimes, and four to ordinary civil cases. Of the four, three are united in the present appeal, included in which number is perhaps the most important of the four, namely, a case in which the law of a State is claimed to be in contravention of the Constitution of the United States.

And appellant believing that oral argument is necessary in order to properly and adequately present these questions to the Court, prays that the benefit and privilege of oral argument be not denied.

And for as much as the case is one in which appellant is given the right to take an appeal direct to this Court by reason of the constitutional questions involved, and the time of appeal on such grounds has not yet expired, appellant prays that in the event the Court may hold that appellant is not entitled to be heard by oral argument by reason of the form of appeal adopted, the Court may permit appellant, within such number of days as may be fixed by the Court, to enter an appeal bringing up the entire cause, in the manner provided in cases in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States, and that

the entering of the present appeal may not be taken or held to prejudice the rights of appellant to a full hearing on such other appeal.

All of which is respectfully submitted.

JOSEPH PACKARD,
JOHN I. HALL,
OLIN J. WIMBERLY,
L. F. GARRARD,
Counsel for Appellant.